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IN THE

Supreme Court of the United States

October Term, 1957

No. 318

ELMER LYSFJORD and WALTER R. WALDRON, doing business as aabeta co.,

Petitioners,

vs.

THE FLINTKOTE COMPANY, a corporation,

Respondent.

Brief of Respondent The Flintkote Company in Opposition to Petition for a Writ of Certiorari.

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FORMAL DEFECTS OF PETITION.

Preliminarily it should be noted that the Petition for a Writ of Certiorari filed herein fails to conform to the requirements of Rule 23 of the Rules of this Court in the following respects:

(1) The matters contained in the Petition are not arranged in the order prescribed by paragraph 1 of said Rule;

(2) The Petition fails to state the questions presented for review in the terms and circumstances of the case as required by subparagraph (c) of paragraph 1 of said Rule;

(3) The Petition fails adequately to state the case accurately, concisely or clearly as required by subparagraph (e) of paragraph 1 and paragraph 4 of said Rule.

These deficiencies in the petition should constitute, without more, a sufficient reason for its denial. But Respondent contends that the petition should be denied on the more basic grounds that (a) there are no "special and important reasons" for granting a review of the decision of the Court of Appeals, and (b) the decision was correct in all the respects in which Petitioners seek to challenge it.

QUESTIONS PRESENTED FOR REVIEW.

Although Respondent cannot read the minds of Petitioners, and although the Petition is exceedingly vague about the questions presented, it is submitted that the only questions presented by the decision and opinion of the Court of Appeals for the Ninth Circuit which Petitioners could or would ask this Court to review are the following:

(1) Whether the Court of Appeals erred in holding that the admission of certain testimony by plaintiff Lysfjord and plaintiff Waldron respecting declarations allegedly made by one Ragland, an employee of defendant, constituted prejudicial error requiring the reversal of the judgment and a new trial of the cause.

(2) Whether the Court of Appeals erred in holding that the trial court erred in denying defendant's motion for new trial on the ground that the evidence was not sufficient to support the jury's verdict as to the amount of damages.

(3) Whether the Court of Appeals erred in holding that plaintiffs could recover damages in this action only for injuries sustained prior to the commencement of the action and that the introduction of evidence respecting injuries sustained at a later time and the instructing of the jury that damages could be recovered for all injuries sustained up to the time of trial constituted prejudicial error requiring reversal of the judgment and a new trial.

STATEMENT OF THE CASE.

Petitioners' statement of the case is inaccurate, distorted and misleading. Respondent therefore presents this statement. Specific comments directed to the inaccuracies in Petitioners' statement are not included herein, for to include them would unduly protract Respondent's statement and would tend to prevent an orderly presentation of the case.

For convenience and for the purpose of more readily identifying the parties, we shall throughout this brief, for the most part, refer to Petitioners Elmer Lysfjord and Walter R. Waldron, plaintiffs and appellees below, as "plaintiffs" and to Respondent The Flintkote Company, defendant and appellant below, as "defendant" or "Flintkote."

Plaintiffs are acoustical contractors doing business in Los Angeles, California. They established their business in December of 1951 or January of 1952. Prior to that time plaintiffs had been employed as salesmen or applicators at various times by other acoustical contractors in the Los Angeles area.

Flintkote is engaged in the business, among others, of manufacturing building materials, including acoustical

tile. Flintkote's acoustical tile is distributed only through approved acoustical contractors.

In the latter part of November [R. 199-202] of 1951, plaintiffs were approved as Flintkote acoustical contractors. There is a dispute between the parties over whether or not that approval was given subject to the limitation that plaintiffs do business in the San Bernardino-Riverside area only and not in the Los Angeles area, except in particular cases and with advance approval. [*E.g.*, R. 1032-35, 198.] On February 19, 1952 plaintiffs were advised that Flintkote no longer considered them to be approved acoustical contractors and would sell no more tile to them, except that necessary to fulfill existing commitments of plaintiffs. The reason given by Flintkote for the termination of plaintiffs' approval as acoustical contractors at the time of such termination and at all stages of the proceedings was that plaintiffs were doing business in Los Angeles contrary to the understanding between plaintiffs and Flintkote. [*E.g.*, R. 239, 361, 1037-38.]

Plaintiffs brought this action on July 21, 1952 [R. 17], charging that Flintkote had refused to sell tile to them pursuant to a conspiracy among the acoustical contractors named as co-defendants to eliminate competition in the acoustical contracting business and, specifically, to eliminate the competition of plaintiffs. [R. 33-34.] Prior to the trial of the case, the defendants other than Flintkote paid plaintiffs $20,000 for a dismissal of the action as to them and a covenant not to sue. [R. 113.] After a trial, the jury returned a general verdict for plaintiffs fixing their damages at $50,000. [R. 104.] Flintkote moved for judgment notwithstanding the verdict and for a new trial [R. 104-05.] These motions were denied.

[R. 116.] The trial court entered judgment for $155,165.70, being treble the $50,000 verdict, plus $25,000 attorney's fees and $165.70 costs, less $20,000 credit for the amount theretofore paid to plaintiffs by Flintkote's co-defendants. [R. 126-27.]

Flintkote appealed, asserting fifteen separate assignments of error, most of which consisted of several claimed errors of similar nature and effect. Those assignments of error were grouped by the Court of Appeals (and its opinion was arranged) as follows [R. 1277]:

> "*First*: The sufficiency of the evidence, (particularly as to *knowledge* by the defendant of the conspiracy, and its participation therein), to support a verdict of violation of the Antitrust Laws.
>
> "*Second:* Alleged errors in admission of evidence.
>
> "*Third:* Alleged errors in instructions, other than damages.
>
> "*Fourth:* Alleged error in refusing to grant a new trial, in instructions respecting damages, in the fixing of attorney's fees, and in the method of crediting the $20,000 payment."

The Court of Appeals first considered whether the trial court had erred in failing to give judgment for defendant notwithstanding the verdict on the ground that there was no substantial evidence in the record from which the jury could have inferred that Flintkote *knowingly participated* in any unlawful conspiracy. [R. 1277-83.] After carefully reviewing the authorities relating to proof of participation in conspiracies and refusals to deal, the Court of Appeals concluded that [R. 1283]:

> "If we assume, therefore, that all evidence which was introduced was properly before the jury, we cannot hold as a matter of law that there was no

> substantial evidence from which a trier of fact could not [*sic*] have inferred the existence of a conspiracy, and that the defendant Flintkote knowingly participated therein. Permitting this issue to go to the jury was not error."

This portion of the decision of the Court of Appeals is obviously satisfactory to plaintiffs, and is not challenged in the petition.

The second portion of the opinion and decision related to errors in the admission of evidence. The court held that the trial court did not err in admitting evidence of the acts and conduct of alleged co-conspirators of Flintkote to prove the existence of the conspiracy and its purpose before Flintkote's connection with the conspiracy was proved. [R. 1283-87.] Plaintiffs do not object to this ruling.

The Court of Appeals then discussed "alleged errors in admitting the testimony of Waldron and Lysfjord, as to the alleged statements of Ragland and others." [R. 1287.] It held that the admission of the testimony regarding the alleged declarations of Ragland constituted prejudicial error requiring reversal of the judgment. [R. 1298.] Plaintiffs apparently seek to have that decision reviewed by this Court; whether this Court should do so will be discussed later.

The Court of Appeals also discussed the admissibility of testimony of plaintiffs regarding statements allegedly made by Baymiller. [R. 1287, 1290-93, 1298.] No question of the admissibility of those statements was raised by the parties at the trial or on appeal. However, the Court of Appeals made no ruling and expressed no

opinion with respect to this evidence; on the contrary, the Court of Appeals expressly said [R. 1298]:

> "His [Baymiller's] position, and his activity in connection with the subject matter of this action justified the admission of his alleged statement for whatever probative value it may have had, provided that a proper foundation had been laid. We need not pass upon that issue here; nor upon the question of what the jury might have decided if this testimony was properly admitted; and the inadmissible Conversation Number 1 [Ragland's alleged declarations] excluded."

Obviously, no question in this respect was decided by the Court of Appeals, its remarks formed no part of the basis for its decision, and no question is presented which this Court could review. Therefore, plaintiffs' remarks at pages 3-4, 6, and 22 of their Petition[1] with regard to this portion of the Court of Appeals opinion are irrelevant.

The Court of Appeals also discussed the testimony of Waldron regarding an alleged telephone conversation with Krause and found the same to have been improperly admitted. [R. 1287, 1290-93, 1298-1300.] This was not raised by the parties on appeal. However, the court made no finding with respect to the prejudicial nature of the admission of that testimony and did not assign it as a ground for reversal. Plaintiffs do not contend that the opinions expressed by the Court of Appeals with respect to the admissibility of this evidence were wrong; they only complain that the court considered the matter. (Pet.

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[1]Citations to the Petition for a Writ of Certiorari herein will hereinafter, for the most part, consist of the abbreviation "Pet." and the page number.

4, note 2; 6, 22.) Since testimony regarding the Krause statements did not form a basis for the reversal of the judgment and no one is complaining about the substance of the Court's remarks in connection with them, there is obviously no question presented to this Court for review in that regard.

At pages 1300-03 of the Record, the Court of Appeals reviewed six separate assignments of error regarding jury instructions on matters other than damages. As to five of these assignments of error, it held that no error was committed in the trial court's instructions. [R. 1303.] No one is contending that the Court of Appeals erred in that respect. The Court of Appeals said that the instructions regarding Flintkote's participation in the conspiracy

> "were misleading and contradictory. They did not help the jury return a careful and thoughtful verdict. The instructions were not correct, and should not have been submitted nor read." [R. 1302.]

It was contended by plaintiffs on appeal that any error in connection with these instructions was waived. The Court of Appeals expressly refrained from assigning the error in instructions as a ground for reversal, as it said:

> "Because of other prejudicial error to which exception was properly taken, we need not here pause to re-consider the question of whether 'plain error' in the giving of misleading instructions may be reviewed where no proper objection or exception was made at the trial." [R. 1302.]

The remarks of the Court of Appeals were to prevent repetition of the same error on a new trial. They formed

no part of the basis for its decision reversing the judgment. Plaintiffs nowhere contend that the instructions were correct as given or that the Court of Appeals was wrong in its remarks about them; plaintiffs contend only that the error could not have been prejudicial. (Pet. 6.11, 25.) Since the Court of Appeals did not consider or rule on the prejudicial effect of the incorrect instructions, and since the error in instructions formed no part of the basis for the decision of the Court of Appeals, and since no one contends that the remarks of the Court of Appeals were incorrect, there is no question presented for review by this Court with regard to instructions to matters other than damages.

The Court of Appeals then carefully considered defendant's contention that the trial court erred in failing to grant a new trial on the ground that the damages were excessive in that there was no substantial evidence to support the jury's verdict as to damages. [R. 1303-11.] The court held that the evidence was insufficient to sustain the verdict and that the cause must be remanded for a new trial. Plaintiffs apparently wish to present for review by this Court the question of whether the Court of Appeals erred in so holding; whether this Court should review the question will be discussed hereinafter. In this connection, it should be noted that the Court did not consider or rule on the question of whether the opinion testimony of plaintiffs regarding loss of profits was admissible in evidence (although this question was squarely presented on the appeal). It held merely that, even considering that testimony, there was not sufficient evidence to sustain the verdict.

The Court of Appeals then considered the question of the period of time for which damages were recoverable. (This involved both the admission of evidence and jury

instructions. The Court held that Flintkote's refusal to deal was "an act of a continuing nature" [R. 1313], that "plaintiffs' injuries resulted from repetitive causes, the day-to-day implied refusal to sell to them" [R. 1315], that "a plaintiff is not entitled to recover damages for injuries resulting from wrongful acts committed *subsequent* to the filing of the action" [R. 1312], that the trial court "admitted evidence and instructed the jury that it could award damages for injuries incurred up to the date the trial began" [R. 1312], that the trial court erred in this respect [R. 1313-15], and that "this question permeates the entire damage award in a substantial manner and if error be found, it is perforce prejudicial." [R. 1312.] Plaintiffs ask this Court to review the question whether the Court of Appeals erred in so deciding; whether this Court should do so will be discussed hereinafter.

The balance of the opinion of the Court of Appeals consisted of a statement that the trial court was correct in crediting the $20,000 received by plaintiffs for a dismissal and covenant not to sue against the judgment for treble the damages found by the jury rather than against the damages found before trebling them [R. 1318] and a statement that, since the judgment was reversed, no consideration of the award of attorney's fees was required. [R. 1319.] Plaintiffs do not complain about the decision in either of these respects, and no question is thereby presented to this Court for review.

ARGUMENT.

In this portion of its brief respondent Flintkote will analyze the questions presented for review (including various subsidiary questions involved therein) and attempt to demonstrate why this Court should not review them, *i.e.*, that (in the words of Rule 19 of the Rules of this Court, entitled "Considerations governing review on certiorari") there are no "special and important reasons therefor", that the decision is not "in conflict with the decision of another court of appeals on the same matter", that the Court of Appeals has not "decided an important question of federal law which has not been, but should be, settled by this court" or "decided a federal question in a way in conflict with applicable decisions of this court" or done anything which would "call for an exercise of this court's power of supervision." On the contrary, the Court of Appeals merely correctly applied some entirely ordinary and well-settled law to this case and reversed a manifestly erroneous judgment.

The Decision With Respect to Improper Admission of Hearsay Evidence Raises No Special or Important Question and Was Manifestly Correct.

The first question presented for review is whether the Court of Appeals erred in holding that the admission of certain testimony by plaintiffs regarding alleged declarations of Ragland constituted prejudicial error requiring reversal of the judgment and a new trial of the cause.

The Court of Appeals held that the testimony was hearsay, was not within any recognized exception to the hearsay rule, and was erroneously admitted (and not stricken) by the trial court. In this the Court of Appeals was clearly correct and in accord with the applicable

authorities. Plaintiffs do not seriously question the correctness of the court's ruling that the testimony was inadmissible hearsay. The only statement in their petition in that regard is (Pet. 24):

> ". . . it is respectfully urged that neither is it hearsay in this type of case, and further, the rejection or admission of this *minutia* of evidence was within the discretion of the trial court."

The cases cited in ostensible support of the quoted statements are not in point and do not support them.

Plaintiffs' real contentions seem to be that the Court erred in reversing the judgment on the ground that the admission of the inadmissible hearsay was prejudicial error because (1) the error was not prejudicial, (2) even if the error was prejudicial, the appellate court may not reverse if the record contains any other evidence which could justify the verdict, and (3) the error was waived.

Petitioners first contend that as a factual matter the error in admitting the testimony was not prejudicial. (Pet. 3-6.) The Court of Appeals discussed whether the error was prejudicial at pages 1297-98 of the Record and concluded that it was. The decision that error was prejudicial can, of course, have no application beyond the particular case and factual setting in which the case occurred. Therefore, the decision of the Court of Appeals could not be in conflict with the decisions of this Court or other Courts of Appeals in this respect, and the decision is not of sufficient importance to warrant review by this Court. Moreover, as its discussion demonstrates, the Court of Appeals was right: the error was prejudicial.

Petitioners' second contention seems to be that there was evidence in the record, other than the inadmissible evi-

dence, from which the jury could have reached the same conclusion, and therefore, even if the error in admitting evidence was prejudicial, the Court of Appeals may not reverse. Any such contention is palpably erroneous. In ostensible support of their position, Petitioners quote the well-established rule that

> "'. . . if there is any substantial evidence to which the jury may properly give credence and which, viewed in its most favorable aspect, would sustain a verdict favorable to the plaintiff, then the court is not authorized to enter an order of dismissal or to direct the jury to return a verdict for defendant.'" (Pet. 23.)

The rule as stated in the quotation is entirely correct. It is also utterly inapplicable to the question whether prejudicial error in the admission of evidence justifies a reversal of the judgment. That rule, as the cases cited by Petitioners amply demonstrate, is applicable *only* to rulings (and the review of rulings) on motions to dismiss or for directed verdict at the close of plaintiffs' case or at the close of all the evidence and to motions for judgment notwithstanding the verdict. It is submitted that there is no

> ". . . axiomatic principle that an appellate court may not reverse a jury verdict on the ground that inadmissible evidence had been received if there is any other evidence to support the verdict, and especially where there is other evidence coming from defendant's own witnesses, as here." (Pet. 24.)

The cases cited in support of the above quotation neither hold nor say that any such principle exists: *Heinwood v. Chaney*, 156 F. 2d 392 (8th Cir., 1946), held that there was no error in the admission of evidence, and went on to say that the only questionable evidence was not prejudicial; and *Lavender v. Kurn*, 327 U. S. 645, 66 S. Ct. 740

(1946) held that the Supreme Court of Missouri erred in reversing a judgment for plaintiffs on the ground that the evidence was insufficient to support the verdict. *Myers v. Reading Co.*, 331 U. S. 477, 67 S. Ct. 1334 (1947), and *Ellis v. Union Pac. R. Co.*, 329 U. S. 649, 67 S. Ct. 598 (1947), both involved the question of whether the evidence was sufficient to support a verdict for plaintiff, not whether prejudicial error in the admission of evidence would warrant reversal.

There is no principle giving the trial court any discretion to commit prejudicial error in the admission of hearsay testimony, and the cases cited in the second full paragraph on page 24 of the Petition do not state or support any such principle.

Plaintiffs also contend that Flintkote waived any error in "any hearsay which may have been admitted regarding complaints of petitioners' competitors . . . . . by the affirmative introduction of the same type of evidence . . ." (Pet. 24.) In this case, the Ragland declarations related to a *joint* meeting among representatives of Flintkote and various contractors approved by Flintkote at the Flintkote offices, to alleged threats of boycott, and to alleged efforts by the contractors to stop plaintiffs' operations [see footnotes 6, 7 and 8 to the opinion of the Court of Appeals at R. 1287-90 which collect the testimony]. There was no other evidence introduced by anyone tending to show that such events took place. The only evidence introduced by Flintkote with regard to the occurrences mentioned in the alleged Ragland declarations was to have all of the alleged participants (except Newport, who was unavailable) and Ragland deny that the occurrences took place or that the alleged declarations were made. Clearly such action by Flintkote does

not constitute a waiver of its objection to the evidence it was attempting to rebut. See 89 C. J. S., *Trial*, §664, p. 507; 64 C. J., *Trial*, §1175, p. 1292; I WIGMORE ON EVIDENCE, §18, p. 345 (3d ed.: 1940); *Salt Lake City v. Smith*, 104 Fed. 457 (8th Cir., 1900); *United States v. Konovsky*, 202 F. 2d 721, 727 (7th Cir., 1953). The cases cited by Petitioners in this connection (Pet. 24-25) are not in point. They stand for the proposition that a defendant waives any error in the denial of a motion for directed verdict at the close of plaintiffs' case if defendant thereafter introduces evidence and proceeds with the defense. Obviously that principle is inapplicable to the question of whether prejudicial errors in the admission of some of plaintiffs' evidence were waived.

The decision of the Court of Appeals that the testimony of plaintiffs regarding the alleged Ragland declarations constituted prejudicial error requiring reversal was correct, was in accord with the clear weight of authority, and was not in conflict with any decision of this Court. No question warranting any review by this Court is presented by that decision.

The Decision With Respect to the Sufficiency of the Evidence to Support the Verdict as to Damages Raises No Special or Important Question and Was Correct.

The Court of Appeals held that there was not sufficient evidence to support the jury's verdict as to damages and that that required the reversal of the judgment. [R. 1311.] In order to put that ruling in its proper perspective and to dispose of much extraneous comment in the Petition, it is necessary to note what the Court did *not* do. The Court made no finding that the verdict was "grossly excessive or monstrous", although it said it had

the power to reverse in the case of such a verdict [R. 1304]. Thus the first paragraph on page 26 of the Petition is both inaccurate and irrelevant. The Court did not rule on the admissibility of any evidence respecting damages: it made its ruling on the basis of all evidence admitted, without regard to whether the same was properly admitted. Thus Petitioners' comments (Pet. 13, 20, 26-28) about admissibility of opinion testimony are irrelevant. The Court did not weigh the evidence. It held only that there was no evidence as to lost profits other than the "opinion" testimony of plaintiffs, and, as to that, that there was *no evidence* to show (1) that plaintiffs were experts in business prognosis [R. 1305-06], or (2) that there was any factual basis for the opinions expressed. [R. 1306-11.] The Court's ruling is epitomized at page 1311 of the Record in the following statements:

> "Where, as here, the sole evidence as to loss of profits is the testimony of the plaintiffs, both inexperienced in business operations, stating what they had expected to make during the infancy of a newly-created enterprise based on inaccurate computations of the most money they had made working as salesmen for an established firm in years preceding those in question, with no attempt having been made to establish a comparison as to either the businesses or the years, the jury verdict predicated on such evidence cannot stand.
>
> "We do not hold nor imply that a jury verdict could not be upheld under any circumstances solely on the testimony of the plaintiffs. We hold only that if they are qualified to make these estimates, the record must show their competency and the factual basis upon which they rest their conclusions."

The authorities discussed and cited by the Court of Appeals in its opinion demonstrate that the legal principles upon which the Court based its decision in this

respect are correct and well-established. Petitioners cite no cases which are contrary to those principles. They seem only to contend that the Court of Appeals erred in applying those principles to the facts as disclosed by the Record in this case, *i.e.*, that the record contains facts showing plaintiffs to be sufficiently expert in business prognosis to give opinions and that the record contains a suitable factual basis for those opinions. In this connection, we note that the quotation on page 27 of the petition, ostensibly from *State of Washington v. United States*, 214 F. 2d 33 (9th Cir. 1954), does not appear at any place in the *Washington* opinion, and, in addition, the statement is *contra* to the tenor of the opinion, the Court saying, at page 43 of 214 F. 2d: "Opinion evidence without any support in the demonstration and physical facts, is not substantial evidence. Opinion evidence is only as good as the facts upon which it is based." None of the cases mentioned in the Petition suggested that no qualifications for the expert or facts forming the basis for his opinion need appear in the record, or that the action of the trial court in admitting the opinion was not subject to review, or that any opinion was necessarily sufficient evidence, without more, to sustain the verdict.

Obviously the action of the Court of Appeals in applying well-settled and correct principles of law to the Record in this case can have no application beyond this particular case and its factual setting. Such a decision cannot be in conflict with the decisions of this Court or other Courts of Appeal. There is nothing sufficiently special or important about the decision to warrant review by this Court. Moreover, the decision was correct: the Record was insufficient in the respects mentioned.

The Decision With Respect to the Injuries for Which Damages Were Recoverable Raises No Special or Important Question and Was Manifestly Correct.

The Court of Appeals held that the action of the trial court in admitting evidence with respect to, and instructing the jury that it could award damages for, injuries incurred up to the date trial began constituted prejudicial error requiring reversal of the judgment. [R. 1312-15.] As the Court of Appeals stated, at page 1312 of the Record:

> "Two well-settled propositions of law govern the determination of this issue. Succinctly stated, they are, that a plaintiff is entitled to recover all damages for injuries proximately caused by wrongful acts committed *prior* to the filing of the action; and conversely, a plaintiff is not entitled to recover damages for injuries resulting from wrongful acts committed *subsequent* to the filing of the action."

Petitioners do not contend that those are not the controlling principles.

The issue is whether the refusal of Flintkote to deal with plaintiffs was (as the Court of Appeals held) an act of a continuing nature—an implied-in-law series of day-to-day refusals, or a final irrevocable act (as plaintiffs contend).[2] The heart of the ruling of the Court of Appeals on that issue is as follows [R. 1313]:

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[2]Plaintiffs seek to bolster their position that Flintkote's conduct in refusing to deal with plaintiffs constituted a single act, rather than a series of acts, by such statements as "the jury found that Flintkote's act . . . was done with a knowing and willful purpose of destroying petitioners' business" (Pet. 3), "the very purpose of the [Flintkote's] act as found by the jury under explicit instruction . . . namely to destroy petitioner's business"

"Appellees' characterization of the refusal on February 19, 1952, as a '*permanent*' and fixed act is a mere conclusion, and more important, incorrect. In the very nature of things, the announcement lacked finality. It could mean no more than that Flintkote, on that day, was absolutely and unalterably opposed to future dealings with the plaintiffs. Appellees confuse unequivocally with permanency. Flintkote's position was neither irrevocable nor immutable. It was under no legal duty to adhere to that position. On the contrary, it was at all times completely free to reconsider and modify its views.

"This cause of action is founded on an act of a continuing nature: The express refusal to deal constituted no more than a refusal to deal at that time. Plaintiffs' injuries were not caused just by the announced refusal but rather resulted from the ex-

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(Pet. 16), "Flintkote's purposeful destruction of appellees' business" (Pet. 17), "the evidence, the instructions, and the jury's verdict held that the sole purpose of Flintkote's act in terminating petitioners' only source of supply of acoustical tile was to *eliminate* the petitioners' competition in the industry—not day to day, but permanently" (Pet. 17). Those statements are grossly inaccurate exaggerations of the Record. There is no evidence in the Record even tending to indicate that Flintkote intended to destroy plaintiffs' business. The jury's general verdict [R. 104] cannot constitute any finding of an intention by Flintkote to destroy plaintiffs' business, especially when, under the instructions, "If you are satisfied from all the evidence that any two or more of the defendants acted together for the purpose and with the effect of eliminating the competition in the purchase, sale or installation of acoustical tile, then you may return a verdict against the defendants and in favor of the plaintiffs. . . ." [R. 1245]. Further, there is no evidence that plaintiff's business was destroyed. On the contrary, the evidence shows that plaintiffs continued in the acoustical contracting business up to the time of trial [R. 1193-1195] on a profitable basis [R. 1199] and that their business was not destroyed. Obviously, then, the quoted statements are not accurate and have no bearing on any determination of the correctness of the ruling of the Court of Appeals that Flintkote's conduct in refusing to deal with plaintiffs was a continuing series of implied in-law refusals to deal.

plicit refusal coupled with the implied persistence in the announced course of conduct."

If the Court of Appeals was correct in its characterization of Flintkote's refusal to deal with plaintiffs as an act of a continuing nature, then obviously plaintiffs could only recover such damages as they may have suffered (at any time) by reason of their inability to obtain tile from Flintkote prior to the filing of the complaint, and the Court's ruling was clearly correct; if the characterization was wrong, so was the ruling.[3]

We submit that Flintkote's act was of a continuing nature and that the decision of the Court of Appeals was entirely correct. That characterization is consistent with both reason and authority. As demonstrated by the authorities cited by the Court of Appeals, it is consistent with such other decisions as have considered the point. Plaintiffs have cited no contrary authority.

The point is settled; the Court of Appeals correctly applied the law; there is nothing sufficiently special or important about the point to warrant review by this Court.

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[3]There is nothing in the opinion of the Court of Appeals which requires that plaintiffs cease business as a prerequisite to recovering damages resulting from wrongful refusal to deal as Petitioners seem to claim at page 26 and note 10 on pages 16-17 of the Petition.

CONCLUSION.

This case involves a substantial amount of money, a fairly lengthy record, an inordinate number of errors by the trial court, and an extended opinion by the Court of Appeals. Upon analysis, however, it appears that Petitioners seek review by this Court of but three aspects of the case, and as to those aspects that (1) the issues are fairly simple, (2) the law applied by the Court of Appeals is well settled, (3) no conflict appears between this decision and decisions of this Court or other Courts of Appeals, (4) there is nothing new, novel, special, unusual or important about any of them, (5) two of the three have no application beyond this case and actually have only a limited effect on a re-trial of this case, (6) none of them involve the public interest by any substantial effect on the enforcement of the anti-trust laws through private treble-damage actions, (7) no reason exists why this Court should review them on certiorari.

Petitioners attempt to conceal the essentially simple ordinary and unimportant (except to the parties) nature of this case by stating the questions presented in flamboyant terms as if fundamental principles, basic human rights, the essence of justice, and the core of the judicial process were involved. Analysis demonstrates, however, that "trial by jury" (Pet. 18, Par. No. 1), "trial and appellate procedures" (Pet. 19, Par. No. 2), "public policy" (Pet. 19, Par. No. 3), "the private enforcement policy of the treble damage provisions of the Sherman Act" (Pet. 19, Par. No. 4), and "crippling effects of this decision in the

future enforcement of the Sherman Act" (Pet. 21, Par. No. 9) are simply not involved in this case. Presumably this Court will not be misled.

The decision of the Court of Appeals is not in conflict with the decision of any other Court of Appeals; no important question of federal law was decided which has not been, but should be, decided by this Court; no question was decided in a way in conflict with applicable decisions of this Court; there was no departure from the accepted and usual course of judicial proceedings; no reason exists for reviewing the decision of the Court of Appeals in this case.

It is respectfully submitted that the petition should be denied.

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G. RICHARD DOTY,
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